Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ENRIQUE MARUGÁN GIRÓ,

Petitioner,

v.

BANCO ESPAÑOL DE CRÉDITO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a person who is the intended victim of a criminal enterprise engaged in extortion and who suffers the intended injury from that extortion, should be foreclosed from prosecuting a civil RICO action merely because it took several steps to cause the injury which ensued.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion is unpublished and is set forth in Appendix A. The district court opinion is also unpublished and is set forth in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on March 17, 2000. The Second Circuit entered an order affirming the judgment of the district court, dismissing Petitioner's complaint.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 18, Section 1964(c) (hereinafter referred to as civil RICO) provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a

> violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C.A. § 1964(c) (West Supp. 1985-1999).

STATEMENT OF THE CASE

A. Proceedings Below

Enrique Marugán Giró (Mr. Marugán) filed a complaint, which included civil RICO causes of action and tort causes of action under New York law, against Banco Español de Crédito, ("the Bank"), in the United States District Court for the Southern District of New York. Count I alleged that the Bank violated 18 U.S.C. § 1962(c); Count II alleged that the Bank violated 18 U.S.C. § 1962(d); Count III alleged an intentional interference with a prospective business relationship under New York law; and Count IV alleged a *prima facie* tort under New York law. The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 18 U.S.C. § 1964(c) (civil RICO jurisdiction), and 28 U.S.C. § 1367(a) (supplemental jurisdiction). The district court's jurisdiction over the action was an issue raised on appeal to the Second Circuit .

The Bank filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6). Before briefing on the motion to dismiss was complete, Mr. Marugán filed a single request for production aimed at establishing subject matter jurisdiction. The Bank filed a response objecting to the request and refusing to produce any documents.

Both parties requested discovery conferences pursuant to local rule and both parties requested oral argument on the pending motion to dismiss.

The district court heard oral argument on the motion to dismiss and on the discovery issue. The district court held that it did not have subject matter jurisdiction over the action because Mr. Marugán had not satisfied the "effects test," which it determined governed the extraterritorial application of RICO. The extraterritorial application of RICO was at issue because Mr. Marugán is a Spanish citizen who is suing for injuries to his investments in New York City and the defendant is a Spanish bank which conducts business in New York through its branch office, located in New York City.

The district court ultimately entered a final judgment granting the Bank's motion to dismiss and declining to exercise its supplemental jurisdiction over the state law claims. The district court did not decide the pending discovery issue. Thus, Mr. Marugán's lawsuit was dismissed with prejudice, without even the benefit of discovery limited to jurisdiction.

Mr. Marugán timely filed a notice of appeal with the Second Circuit. After briefing and oral argument, the Second Circuit entered a Summary Order, affirming the district court's dismissal of the complaint on a different basis, that is that Mr. Marugán had not satisfied the requirement of proximate cause under civil RICO. The Second Circuit thus found it unnecessary to address whether the district court had erred by failing to consider Mr. Marugán's pending discovery request. This petition for writ of certiorari followed.

B. The Complaint

Mr. Marugán, a Spanish citizen and an international businessman, sued a Spanish bank with a branch office in New York City, to recover damages which he suffered as a victim of a well-orchestrated and sophisticated scheme to extort monies by the Bank and its co-conspirators. This scheme was perpetrated by the Bank, through its officers, directors, and attorneys, by a Spanish Judge, and by numerous Spanish attorneys, all of whom exploited their positions for economic gain. While this scheme originated in Spain, the conspirators selected victims, who, like Mr. Marugán, did business internationally. Specifically, the Bank targeted Mr. Marugán's investments in New York City.

On July 27, 1994, in Barcelona, Spain, the Bank filed a criminal action against the officers and shareholders of a group of companies collectively referred to as "Grupo Harry Walker" for collection of a debt and fraud. At the time, the Bank did not own the debt at issue but had sold it to another bank and its factual allegations were patently false. Mr. Marugán was named as a witness in this action.

Prior to filing the criminal action, and notwithstanding that judges are supposed to be randomly selected, the Bank alerted the media that the members of Grupo Harry Walker would be sued in the court of Judge Pascual Estevil. The case was assigned to Judge Macia Gomez who accepted jurisdiction but reserved his decision as to whether the case should proceed as a criminal action. Not surprisingly, the case wound up in front of Judge Pascual, a co-conspirator of the Bank, as soon as Judge Macia left on vacation.

On September 7, 1994, the day after Judge Macia left on vacation, the attorney for the Bank, Rafael Jimenez de Parga, appeared before Judge Pascual. Notwithstanding that Judge Macia had scheduled hearings for September 13 and 19, and without having heard any testimony, having reviewed any documents, or having heard from the defendants, Judge Pascual made a finding that there was sufficient evidence for the case to proceed as a criminal case.

Further, Judge Pascual illegally changed Mr. Marugán's status from that of a witness to a criminal defendant. Judge Pascual also changed the status of Lorenzo Rosal Bertrand from that of a witness to a criminal defendant. The Judge issued an arrest warrant for Mr. Marugán with an order that he be held without bond.

The Bank subsequently amended its complaint to add Mr. Rosal and Mr. Marugán as criminal defendants and alleged that Mr. Marugán and Mr. Rosal were the masterminds of the alleged fraud. The Bank also insisted that Mr. Marugán be arrested and held without bond and represented that it did not know how to locate Mr. Marugán, even though the Bank knew at all times his location in that Mr. Marugán was a shareholder of the Bank and was regularly receiving correspondence from them.

Shortly thereafter, Mr. Rosal informed Mr. Marugán that Judge Pascual had demanded a payment of 25,000,000 pesetas (approximately $250,000 in U.S. dollars) in exchange for dismissing the actions against each of them and quashing the arrest warrants. Mr. Rosal paid the extortionate demand to the Judge's son, Javier Pascual Franquesa.

In order to exert pressure on Mr. Marugán to pay the extortion, the conspirators communicated to the Spanish press, in particular to the newspaper *El Pais*, distributed in approximately forty countries including the United States, that Mr. Marugán was a criminal defendant in an action brought by the Bank. The Bank and its co-conspirators knew of Mr. Marugán's investments in New York City real estate in particular and intended to harm these investments as part of their extortionate scheme. The conspirators also knew that financing for the purchase and renovation of these properties was obtained through Extebank, a bank located in New York City.

Upon returning from vacation, Judge Macia quashed the arrest warrant and order of imprisonment for Mr. Marugán and dismissed the Bank's action for failure to charge an offense. Although Mr. Marugán persisted in his refusal to pay the extortion and the criminal action was eventually dismissed, the conspirators' extortionate scheme damaged his investments in New York City real estate, as the conspirators had specifically intended.

After being sent a copy of the article on Mr. Marugán in *El Pais*, while the criminal charges were still pending, Extebank became concerned over the security of the personal guarantees executed by Mr. Marugán in connection with the loans on the New York City real estate. After the criminal charges had been dismissed but based on these criminal charges being brought in the first place, Extebank refused to refinance the loans or to extend further credit. This refusal resulted in Mr. Marugán not being able to renovate the townhouse on the second piece of property. The first piece of property, an abutting parcel, which like the other parcel had a townhouse on it, had been fully renovated and was

eventually sold at a profit. Mr. Marugán was unable to sell the second property until 1997, when he sold it at a loss exceeding $1,900,000.

Judge Pascual was convicted in Spain of abuse of judicial office, false imprisonment, and unauthorized practice of law while holding judicial office and is incarcerated. Mr. Marugán expressly waived his right to compensation under Spanish law so that he could pursue his claim for damages in the United States. The Bank, its officers, directors, and lawyers are currently under criminal investigation in Spain. Mr. Marugán's statute of limitations for bringing an action against the Bank in Spain has expired.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION REPRESENTS A BREAK FROM SUPREME COURT AND SECOND CIRCUIT PRECEDENT.

For the first time in this case, the Second Circuit has announced a proximate cause requirement to bring a civil RICO cause of action which is so onerous that it prevents the intended victim of a criminal enterprise engaged in extortion, who suffered the very harm which was intended by the conspirators, from surviving a motion to dismiss. The instant decision represents a break with this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and with prior decisions of the Second Circuit.

In *Holmes*, this Court considered 18 U.S.C. § 1964(c), RICO's provision for civil actions, and interpreted the "by

reason of" language to include a proximate cause requirement based on an analysis of the Clayton and Sherman Acts, which included similar civil action provisions. *Id.* at 268. The Court determined that Congress meant to incorporate common law principles of proximate cause into these civil action provisions. *Id.* at 268-69.

The Court explained that third persons whose injuries resulted from the harms inflicted on the targets of defendant's acts did not satisfy the proximate cause requirement. *Id.* at 268-69. The Court stressed, however, that victims who were directly injured by defendant's acts would satisfy the proximate cause requirement. *Id.* at 269. The Court found significant that directly injured victims could "be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70.

Applying the proximate cause requirement to the facts, the Court in *Holmes* held that it was the broker-dealers who were directly injured by the stock manipulation scheme perpetrated by individual brokers, not the plaintiff corporation (or the non-purchasing customers which it represented), which were injured as a result of the broker-dealers' collapse. The Court explained that the conspirators would not go unpunished because the trustees of the insolvent broker-dealers had already sued them. *Id.* at 273. Moreover, the Court explained that:

> We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs. Indeed, we fear that RICO's remedial purposes would more probably

> be hobbled than helped by SIPC's version of liberal construction: Allowing suits by those injured only indirectly would open the door to "massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits."

Id. at 274 (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

Courts use the following test, derived from *Holmes* and *Associated General*, to determine whether an injury is too remote to allow recovery under RICO: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. *See, e.g., Oregon-Laborers-Employers Health & Welfare Trust Fund v. Phillip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (citing *Holmes*, 503 U.S. at 269-70; *Associated General*, 459 U.S. at 545), *cert. denied*, __ U.S. __, 120 S. Ct. 789 (2000).

Here, the conspirators targeted Mr. Marugán directly and, when he did not immediately pay their extortionate demands, they set out to damage his business relationship with a bank in New York and his investments in New York real estate. There is no person more directly injured than this intended victim who in fact suffered the intended injury, and, thus, Mr. Marugán is the proper plaintiff. Moreover,

the amount of plaintiff's damages is primarily the lost profits on New York real estate, which is easily ascertainable. Significantly, Mr. Marugán has waived all of his rights to recover against the conspirators in Spain and is suing in New York because it was his New York investments that were targeted and damaged by the conspirators. Mr. Marugán should be allowed to act as a private attorney general in vindicating the law here.

Thus, under *Holmes*, because the conspirators' extortionate scheme was directed at Mr. Marugán and not some third person, the proximate cause requirement under civil RICO has been satisfied, and Mr. Marugán's lawsuit should be allowed to proceed.

All of the cases relied on by the Second Circuit in its opinion are distinguishable from the instant case, where Mr. Marugán was the intended victim and suffered the intended injury. In accordance with *Holmes*, the majority of the cases relied on by the Second Circuit stand for the proposition that third persons whose harm flows from harm to intended victims, as opposed to those directly injured and targeted by the criminal scheme, cannot sue under civil RICO. *See, e.g., Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (smokers, not health and benefit funds, were intended victims), *cert. denied*, __ U.S. __, 120 S. Ct. 799 (2000); *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.) (defendant's competitors, not Abrahams, a foreign tourism official, were the intended targets of the scheme), *cert. denied*, 519 U.S. 816 (1996); *In Re American Exp. Co. Shareholder Litigation*, 39 F.3d 395 (2d Cir. 1994) (a rival of American Express, not American Express shareholders, was the intended target of the scheme to defame); *Hecht v. Commerce Clearing*

House, Inc., 897 F.2d 21 (2d Cir. 1990) (employer's customers, not discharged employee, were targets of RICO scheme). These cases are distinguishable because Mr. Marugán was undisputedly the target of the extortionate scheme.

Significantly, the Second Circuit in *Hecht*, *supra*, carefully distinguished its factual scenario from a scenario in which the plaintiff was the target of the criminal conduct. The court held that Hecht could not recover under civil RICO because he was " 'neither the target of the racketeering enterprise nor the competitor[ ] nor the customer[ ] of the racketeer[s].' " *Id.* at 24 (citation omitted). Thus, the Second Circuit's decision in the instant case represents a clear break from *Hecht* and its progeny because now the Second Circuit holds that a target of a racketeering enterprise does not satisfy the proximate cause requirement under RICO.

The Second Circuit in *Hecht* also held that only RICO predicate acts constitute the overt acts providing the basis for civil RICO conspiracy liability. *Id.* at 25. This Court recently approved of this particular holding in *Hecht* in *Beck v. Prupis*, __ U.S. __, 120 S. Ct. 1608, 1613 (2000). Mr. Marugán also satisfies *Beck's* requirement for bringing a civil RICO conspiracy claim because it was the extortionate scheme, a RICO predicate act, that harmed him. A vital part of the scheme was to exert pressure on the victims to pay the conspirators' extortionate demands by communicating to the press news of the victim's arrest and status as a criminal defendant. The conspirators intended to damage Mr. Marugán's investments in New York and his relationship with a bank in New York. Significantly, the criminal action in Spain had been brought by the Defendant Bank charging fraud in connection with bank loans. Such criminal allegations would certainly hurt Mr. Marugán's business relationships with other banks.

To sum up, Mr. Marugán was directly injured by being the target of the Bank's extortionate scheme, a predicate act under RICO, and by having suffered the intended injury. As a result, he has satisfied the proximate cause requirement under RICO as outlined by this Court in *Holmes* and *Beck*. Moreover, the Second Circuit's decisions holding that third persons who suffer indirect harm cannot satisfy the proximate cause requirement under RICO are clearly distinguishable from the instant case where Mr. Marugán was a target.

In its opinion, the Second Circuit also relied on its decision in *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995), for its conclusion that the chain of events and the length of time between the alleged fraud and the injury were too long and attenuated to satisfy the proximate cause requirement. In *First Nationwide*, the Second Circuit affirmed the district court's dismissal of a RICO action brought by lenders against borrowers, who had allegedly made misrepresentations in connection with their loans. Specifically, the court found that plaintiff had failed to show injury and proximate cause. Plaintiff did not meet the injury requirement because some of its loans were not in foreclosure so the claims were not ripe. With respect to the loans that were in foreclosure, the court considered three factors unique to the allegation that the borrower made a misrepresentation in connection with a loan. First, the court considered the materiality and magnitude of the misrepresentations concerning estimates of the value of collateral. *Id.* at 770-71. The court concluded that the estimates of property values in the complaint were distorted, inconsistent, and pure guesswork. *Id.* at 771. Second, the court considered the five years between the misrepresentations and the injury. *Id.* at 772. Third, the court

factored in that the real estate market in New York had crashed during these five years, which may have accounted for the losses. *Id.* As a result, of the convergence of these three factors, the court found that the proximate cause requirement had not been met. *Id.*

The instant case is different from *First Nationwide*, where injuries were not ripe; the plaintiff's methodology for calculating damages was so defective that it amounted to pure speculation; and there was a market crash which was the likely source of the losses during the five years between the fraud and the alleged injuries. In sharp contrast, here, the conspirators intended to cause the very harm which was suffered by Mr. Marugán. The fact that they had to do several things to cause the intended injury is not fatal to the proximate cause inquiry. Importantly, these prefatory events, like the injury itself, were intended. The *modus operandi* of the conspirators was to leak information to the press which would put pressure on the victims to pay the extortion. Significantly, the complaint alleges that the conspirators knew of Mr. Marugán's investments in New York real estate and of his relationship with a bank in New York. It was foreseeable and intended that the criminal allegations of bank fraud would harm his relationship with this New York bank. This is what the conspirators intended and exactly what happened.

Moreover, damages are not difficult to calculate, and Mr. Marugán's damage methodology is sound. The complaint alleges that Mr. Marugán was not able to renovate a piece of property and suffered lost profits when he was forced to sell without the necessary renovations. *See Frankford Trust Co. v. Advest, Inc.*, 943 F. Supp. 531 (E.D. Pa. 1996) (collecting cases holding that lost profits, or

expectancy damages, are recoverable under RICO). *Cf. National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (recognizing, in RICO case, that general factual allegations of injury resulting from defendant's conduct are sufficient to withstand a motion to dismiss). The three years between the extortionate demand and the sale of the property is not fatal because, unlike in *First Nationwide*, there is no evidence of a crash in the New York real estate market during this time period. Mr. Marugán should not be left without a remedy simply because the conspirators engaged in a scheme which involved a chain of events culminating in the intended injury.

II.

ALLOWING THIS CIVIL RICO ACTION TO PROCEED WOULD FURTHER CONGRESS' INTENT THAT CIVIL RICO BE AVAILABLE TO VICTIMS OF ORGANIZED CRIME WHERE THERE IS A DETRIMENTAL IMPACT ON THE DOMESTIC ECONOMY.

The Second Circuit recognized that the requirements for proximate cause in a RICO case are those intended by the legislature that passed the statute. *See* App. A at 5a. *See also Abrahams*, 79 F.3d at 237. Specifically, the Second Circuit in *Abrahams*, *supra*, explained that:

> With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid.

Id. at 237.

Mr. Marugán is a victim of organized crime, that is a scheme to extort monies from business persons by illegally naming them as defendants in criminal actions and issuing warrants for their arrest without bond. Moreover, part of the scheme involved injuring those who did not immediately comply with the extortionate demands by damaging their reputations and business relationships by way of false articles in the press. Thus, Mr. Marugán, the intended victim of the extortionate scheme, is in the class of persons that the statute meant to protect.

Significantly, Mr. Marugán's lawsuit involves criminal acts, and is not a "garden-variety civil fraud case[ ] of the type traditionally litigated in state courts." William H. Rehnquist, *Address, Remarks of the Chief Justice (at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute)*, 21 ST. MARY'S L.J. 5, 9 (1989). Thus, Mr. Marugán is attempting to use RICO the way Congress intended that it should be used. *Id.* In addition, Mr. Marugán's lawsuit belongs in federal court because the organized crime had a substantial effect on foreign and interstate commerce.

Furthermore, the harm that occurred was the "mischief" that the statute meant to avoid because extortion is a RICO predicate act. Mr. Marugán was damaged by the extortionate scheme, notwithstanding that he refused to pay, because the conspirators intended to harm his relationship with a bank in New York and his investments in New York real estate as part of their plan to exert pressure on him to pay the extortion. In addition, the complaint alleges a violation of 18 U.S.C. § 1951 (interference with commerce by threats or violence) as a second predicate act.

In *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), the Second Circuit expressly held that RICO applied to corrupt foreign enterprises where there was a requisite impact on domestic commerce. In rejecting the claim that RICO did not apply to corrupt foreign enterprises, the court explained that:

> [RICO's] legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.

Id. at 439. Relying on antitrust and securities precedent, the court noted that — even 24 years ago — applying RICO to activities involving foreign contacts did not break new ground. *Id.* at 440.

The instant complaint alleges that a corrupt foreign enterprise targeted Mr. Marugán for extortion and intended to damage his business relationship with a bank in New York and his investment in Manhattan real estate. Thus, in accordance with Congress' intent, the application of civil RICO under the instant circumstances would serve to protect the domestic economy and markets from corrupt foreign influences.

CONCLUSION

No court has ever denied the intended victim, who suffered the intended injury from a RICO predicate act, the opportunity to sue under civil RICO. Mr. Marugán has satisfied the proximate cause requirement announced by this Court in *Holmes* in that he suffered a direct injury as the intended victim of a scheme of extortion, and has satisfied the requirement announced in *Beck* that the predicate act, that is the scheme of extortion, cause the injury. Moreover, Mr. Marugán's lawsuit is aimed at the specific mischief that RICO was designed to address, and, thus, he requests the opportunity to do what the statute contemplated and act as a private attorney general in protecting the domestic economy from corrupt foreign enterprises, while recovering the damages he has suffered.

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MARCH 17, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of March, two thousand.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. GUIDO CALABRESI,
HON FRED I. PARKER,
Circuit Judges

#99-7883

ENRIQUE MARUGÁN GIRÓ,

Plaintiff-Appellant,

v.

BANCO ESPAÑOL DE CRÉDITO, S.A.,

Defendant-Appellee.

Appendix A

SUMMARY ORDER

* * *

Appeal from the United States District Court for the Southern District of New York (William H. Pauley III, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

On September 2, 1998, Enrique Marugán Giró ("Marugán") filed a complaint against Banco Español de Crédito, S.A. ("Bank"), alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), as well as tort causes of action under New York law. The RICO claims were the sole basis alleged for federal jurisdiction over the action; the state law claims were brought under the court's supplemental jurisdiction, 28 U.S.C. § 1367.

Marugán, a Spanish citizen, claims that in July 1994, the Bank filed a criminal action in Spain against the officers and shareholders of a group of companies for collection of a debt and fraud. When the complaint was filed, Marugán was listed as a witness in the action. Moreover, the Bank did not own the debt at issue but rather had sold it to another bank. The suit was brought in the court of Judge Macia Gomez, who reserved decision on whether the case should proceed as a criminal prosecution.

Appendix A

While Judge Macia was on vacation, Judge Luis Pascual Estevill replaced Judge Macia. Judge Pascual found that there was enough evidence for the case to proceed as a criminal action, changed Marugán's status from that of a witness to that of a criminal defendant, and issued a warrant for Marugán's arrest. Judge Pascual allegedly did the same thing to another witness, Lorenzo Rosal Bertrand, and Rosal allegedly told Marugán that Judge Pascual would dismiss the criminal action and the arrest warrants if they paid him 25,000,000 pesetas (about $250,000). Rosal paid the money, but Marugán refused. In September, the Bank amended its complaint to include Marugán and Rosal as criminal defendants, stating that they were the "masterminds" of the fraud.

When Judge Macia returned from vacation, he reinstated Marugán's status as a witness in the action rather than as a defendant and quashed the warrant for Marugán's arrest. Judge Macia also dismissed the Bank's complaint, finding that it failed to charge an offense. Subsequently, in July 1996, Judge Pascual was convicted in Spain of abuse of judicial office, false imprisonment, and the unauthorized practice of law. The Bank, its attorney, and many of its former officers and directors are currently under investigation in Spain.

Marugán alleges that there was a conspiracy between the Bank and Judge Pascual and that, even though Marugán was eventually cleared of all charges, Marugán was still damaged by the conspiracy because data about both the criminal action and his arrest warrant were issued to the Spanish press. This information became known in several different countries in 1994, and Marugán contends that, as a

result, his good name and reputation were tamished. In particular, Marugán claims that two of his companies lost money on a couple of real estate projects in New York City in 1997 because his financial backers were concerned by the Spanish criminal action against him and refused to extend further credit or to refinance a loan that had been provided to his companies.

The Bank moved to dismiss the complaint under Rules 12(b)(6), 12(b)(1), and 12(b)(3) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted, for lack of subject matter jurisdiction, and on forum non conveniens grounds. The district court granted the Bank's motion and dismissed for lack of subject matter jurisdiction, finding that there were insufficient effects in the United States for Marugán to assert RICO claims against the Bank. It also declined to exercise its supplemental jurisdiction over Marugán's state law claims. We now affirm the dismissal of the complaint for lack of adequate allegations of proximate causation, which by itself suffices to undergird the jurisdictional grounds for dismissal relied on by the district court. *See infra* note 2.

"RICO provides a civil remedy only to those persons injured 'by reason of' the defendant's predicate acts." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (quoting 18 U.S.C. § 1964(c)). Therefore, in order to state a valid RICO claim, Marugán must demonstrate that the defendant's acts proximately caused the harm complained of, that is, he "must show . . . that he is within the class the statute sought to protect[,] . . . that the harm done was one that the statute was meant to prevent," and

that the distance in time and space between the wrong and the harm was not too great. *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 237 (2d Cir. 1996). "Where . . . the [causation] requirement is statutory, it is the statute itself that establishes how near or how distant the 'but for' cause must be if it is to meet the statutory test." *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, __ F.3d __, 2000 WL 217563, at *5 (2d Cir. Feb. 25, 2000) (citing *Moore v. Painewebber, Inc.*, 189 F.3d 165, 178 (2d Cir. 1999) (Calabresi, *J.*, concurring) ("It should not be forgotten, however, that the pertinent requirements of proximate cause in a RICO case are those intended by the legislature that passed the statute, and not those of the common law.")).

In this case, Marugán claims that his alleged injury was proximately caused by the supposed conspiracy in Spain as required by RICO. But the causal chain between Marugán's injury and the alleged conspirators' acts is quite long and attenuated. According to Marugán, the events are as follows: first, the Bank and Judge Pascual conspired to fabricate criminal charges against Marugán, resulting, in 1994, in the issuance of a warrant for his arrest. The Bank then caused the Spanish press to publish the fact that criminal charges were pending against Marugán and that there was a warrant out for his arrest. That negative information then reached the United States and, influenced by that data, a bank refused to refinance a loan for Marugán's companies in the United States and eventually canceled the loan. Due to this cancellation, renovations could not be finished on the New York property as planned. Because renovations were incomplete, Marugán was forced to sell the property three

years after the phony charges were made against him in Spain, at a loss of $1,900,000.[1] *See Giró v. Banco Español de Crédito*, 1999 WL 440462, at *3 (S.D.N.Y. June 28, 1999).

Under our RICO precedents, this causal chain is too weak to satisfy the statutory causation requirement. For example, in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990), an employee asserted RICO claims because he was fired after he refused to aid or abet alleged RICO violations of his employer and co-employees. *See id.* at 22. The employee claimed that he had thereby lost commissions. *See id.* at 23. The court found this claim overly speculative, but stated that "[e]ven assuming that Hecht actually lost commissions, we hold that his injury was not proximately caused by violations of section 1962(c)." *Id.* at 24. In so ruling, the court explained that "[a]lthough Hecht's loss of employment may have been factually caused by defendants' RICO violations, it was not a foreseeable natural consequence sufficient for proximate causation." *Id.*; *see also First Nationwide Bank*, 27 F.3d at 772 (a case involving allegedly fraudulent valuations of properties used as

1. Marugán's corporations actually bought two properties in 1993 for a total of $2.1 million and allegedly improved them with a $1.8 million loan. The first property, which had a purchase price of $1.25 million, sold in 1996, two years after the phony charges in Spain, for $4.11 million. Marugán claims that, even after this first property was sold at a profit, the bank refused to refinance his loan for renovations based on his (by then dismissed) criminal charges, and his corporations were left without sufficient funds to complete renovations on the second property. This second property sold for $1.125 million in 1997, which Marugán claims represented a loss of $1.9 million.

collateral for non-recourse loans, in which we said that "[e]ven if we were to accept [the plaintiff's] questionable methodology for alleging the magnitude of the defendants' alleged fraud, the complaint still falls short of pleading proximate cause because" there was a "substantial period between the alleged fraud and [the plaintiff's] loss, coupled with the concurrence of that loss with the real estate market crash"); *Laborers Local 17 Heath & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234-39 (2d Cir. 1999) (finding that there was no proximate cause under the RICO statute in cognate circumstances), *cert. denied*, 120 S. Ct. 799 (2000); *Abrahams*, 79 F.3d at 237-39 & n.3 (same); *Lewis v. Robinson* (*In re American Express Co. Shareholder Litig.*), 39 F.3d 395, 399-402 (2d Cir. 1994) (same).

In the case before us, the three years between the alleged fraud and Marugán's claimed loss, though not quite as great a period of time as in *First Nationwide Bank*, was nevertheless long enough to make it likely that "the loss [was] attributable to events occurring in the interim." *First Nationwide Bank*, 27 F.3d at 772. When we add to this fact the number of independent intervening actions and decisions by third parties (without which Marugán's purported loss would not have occurred), as well as the disconnect between the alleged harm that eventuated (the sale of a U.S. property at a loss) and that which was immediately intended (the payment of a bribe to a judge), we are bound to conclude that Marugán's claims cannot satisfy the proximate cause requirement of RICO.

Since Marugán has failed to allege facts that would show that he was injured "by reason of" the Bank's actions under

the RICO statute, and since such a showing is a prerequisite to stating a RICO claim, *see Laborers Local 17*, 191 F.3d at 244 (ordering district court to dismiss RICO claims where plaintiffs' alleged injury was "too remote as a matter of law"); *First Nationwide Bank*, 27 F.3d at 772 (affirming dismissal of complaint because proximate case under RICO statute was not "adequately alleged"), Marugán's suit must be dismissed.[2] We have considered all of Marugán's arguments and find them without merit. The judgment of the district court is therefore AFFIRMED.

For the Court:

ROSEANN B. MACKECHNIE,
Clerk

by s/ Lucille Carr

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2. The same result follows on the statutory jurisdictional questions concerning RICO extraterritoriality raised in this case. Before we could find that this statute applied extraterritorially, the plaintiff would have to show, at a minimum, that he could meet the causation requirement of the statute. For that, on the facts before us, is a prerequisite to any showing of a minimal connection between this suit and the United States. Because Marugán has not alleged sufficient facts to show proximate cause under RICO, he also has not alleged enough to establish extraterritorial jurisdiction.

Because Marugán's request for discovery went to establishing a basis for jurisdiction despite the fact that all the parties are external to the United States, and because, as noted above, Marugán would lose on lack of proximate cause even if extraterritorial jurisdiction existed, the ruling with respect to discovery, even were it erroneous, which we doubt, would be harmless.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 25, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 6195 (WHP)

ENRIQUE MARUGAN GIRO,

Plaintiff,

– against –

BANCO ESPANOL DE CREDITO, S.A.,

Defendant.

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff, Enrique Marugan Giro ("Marugan") commenced this federal action on September 2, 1998 against defendant Banco Espanol de Credito, S.A. ("Banesto"). The complaint alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d), and claims for intentional interference with prospective business relationship, and prima facie tort under New York law. The RICO claims provide the sole basis for federal jurisdiction. Defendant moves pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(b)(1), and 12(b)(3) to

dismiss the complaint for failure to state a claim, lack of subject matter jurisdiction, and on forum non conveniens grounds. Upon consideration of the parties' written submissions and oral argument heard on April 22, 1999, defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Plaintiff's claims under state law are dismissed under 28 U.S.C. § 1367(c)(3).

Background

Where defendants move for dismissal on several grounds including lack of subject matter jurisdiction, the jurisdictional challenge ought to be resolved first. *Rhulen Agency v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990). In considering a motion to dismiss for lack of subject matter jurisdiction, the factual allegations of the complaint are presumed to be true. *Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992); *Sierra v. United States*, No. 97-9329, 1998 WL 599715, at *1 (S.D.N.Y. 1998) (Sweet J.) However, argumentative inferences favorable to the party asserting jurisdiction should not be drawn. *Id.* Accordingly, the Court finds the following facts.

On July 27, 1994, Banesto filed a criminal action in Spain against the officers and shareholders of a group of companies ("Harry Walker Group") for collection of a debt and fraud. (Compl. ¶ 28.) Marugan was listed as a witness in that action. At the time Banesto filed the complaint, it did not own the debt at issue but had sold it to another bank. The action was filed in the court of Judge Macia Gomez, who reserved decision on whether there was sufficient

evidence for the case to proceed as a criminal action. After scheduling two hearings in September 1994, Judge Gomez left for vacation. (Compl. ¶ 30.)

Judge Gomez was replaced by Judge Luis Pascual Estevill. Without hearing any testimony or reviewing any testimony, Judge Pascual found that there was sufficient evidence for the case to proceed as a criminal action. In addition, Judge Pascual changed Marugan's status from a witness to a criminal defendant, and ordered him to appear before the court. On September 11, 1994, Judge Pascual issued an arrest warrant for Marugan with an order that he be imprisoned without bond. (Compl. ¶ 34.) Judge Pascual took similar actions with another witness, Lorenzo Rosal Bertrand ("Rosal"). "Rosal informed Marugan that Judge Pascual had requested a payment of 25,000,000 pesetas (approximately $250,000) in exchange for dismissing the the criminal action and the arrest warrants." (Compl. ¶ 35.) Marugan refused to pay.

Meanwhile, information about the criminal action and the arrest warrant was issued to the Spanish press. On September 13, 1994, the "El Pais", a widely circulated Spanish newspaper that is distributed in forty countries including the United States published an article stating that a warrant had been issued for Marugan's arrest in connection with a criminal action for collection of a debt and fraud. (Compl. ¶ 38.) On September 27, 1994, Banesto amended its complaint to include Marugan and Rosal as criminal defendants and alleged that they were the "masterminds" of the fraud.

As a result of this conspiracy, Marugan's business relationships in Canada, Spain, Austria, Switzerland, Brazil, and Ireland have been injured, and his good name and professional reputation have been tarnished. The conspiracy also impacted Marugan in the United States. Marugan owned and managed two New York corporations, Pearlmere 66th Street Corporation and Finax 65th Street Corporation. Through these corporations, Marugan purchased two pieces of real estate in New York for a total sum of $2,100,000. Marugan paid $1,250,000 for the 66th Street property and $850,000 for the 65th Street property. Marugan financed the purchase through a $1,800,000 loan from Extebank. After learning of the article about Marugan in the "El Pais," Extebank was sufficiently concerned over the security of Marugan's personal guarantees, that it refused to refinance the loan or extend further credit. (Compl. ¶ 52.) Marugan sold the 66th Street property for $4,110,000, making a profit of $2,860,000. (Compl. ¶ 54.) Extebank then canceled the loan, forcing Marugan to sell the 65th Street property incurring a loss exceeding $1,900,000. (Compl. ¶ 55.) In sum, Marugan made a profit of $960,000.

After Judge Gomez returned from his vacation, he reinstated Marugan's status as a witness and quashed the arrest warrant and the order of imprisonment. In addition, Judge Gomez dismissed Banesto's action for failure to charge an offense. The court's decision was affirmed on appeal. On July 4, 1996, Judge Pascual was convicted in Spain for abuse of judicial office, false imprisonment, and the unauthorized practice of law. Banesto, its attorney, and many of its former officers and directors are currently subjects of a criminal investigation in Spain.

Appendix B

Discussion

Marugan contends that this Court has federal question jurisdiction because the claims involve violations of a federal statute, namely RICO, 18 U.S.C. § 1964(c) and (d). Defendants argue that RICO does not apply to a dispute among foreign nationals involving conduct that took place abroad. The RICO statute is silent regarding its extraterritorial application. *Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir.), *cert denied*, 502 U.S. 1005 (1991). In the face of such silence, the ultimate inquiry is whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [foreign transactions] rather than [to] leave the problem to foreign countries. *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). Although, the Second Circuit has not yet chosen to specify the test for the exterritorial application of RICO, courts have been guided by cases involving the extraterritorial application of the securities and antitrust laws. *North South Finance Corp.*, 100 F.3d at 1050. In determining whether to apply the securities and antitrust laws extraterritorially, courts have employed two alternative tests, the "conduct test" and the "effects test."

Under the conduct test, subject matter jurisdiction exists only where conduct material to the completion of the fraud occurred in the United States. *See Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991) (upholding assertion of jurisdiction because predicate acts occurred primarily in the United States); *Madanes*, 981 F.Supp. at 251 (applying conduct test

to assert jurisdiction over RICO claims where fraud took place in United States); *Bank of Crete, S.A. v. Koskotas*, No. 88-8412, 1991 WL 177287, at *6 (S.D.N.Y. 1991) (Wood J.) (asserting jurisdiction over RICO claim because predicate acts occurred in United States). *But see C.A. Westel de Venezuela v. American Telephone and Telegraph Co.*, No. 6665, 1993 WL 497971 at *4 (S.D.N.Y. 1993) (Leisure J.) (rejecting conduct and effect tests in RICO action, but asserting jurisdiction because predicate acts occurred in United States). Moreover, mere preparatory activities are insufficient to establish jurisdiction. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (holding no jurisdiction over RICO claims when fraud took place abroad and only peripheral preparations occurred in United States). Only where conduct "within the United States directly caused" the loss will a district court have jurisdiction over suits by foreign citizens. *North South Finance Corp.*, 100 F.3d, 100 F3d at 1050 (*citing Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (*quoting Bersch*, 519 F.2d at 993)). In this action, all of the alleged acts took place in Spain. Thus, as none of the predicate acts occurred in the United States, this Court lacks federal subject matter jurisdiction based on the conduct test.

Under the alternative effects test, jurisdiction exists when there are substantial effects within the United States. Transactions with only remote and indirect effects in the United States do not qualify as substantial. *See North South Finance Corp.*, 100 F.3d at 1051; *Consolidated Gold Fields PLC v. Minorco*, 871 F.2d 252, 261 (2d Cir. 1988). At oral argument, plaintiff stated that the effects test should apply to this action.

Plaintiff argues that Banesto willfully injured Marugan in New York because it knew about the two real estate properties. Here, the effects in the United States of the conspiracy to extort money from Marugan can hardly be classified as direct. The only effect in the United States was the $1,900,000 loss Marugan incurred on the sale of the 65th Street property. This loss is too remote and indirect to confer jurisdiction under the effects test. *See Philan Insr. Ltd. v. Frank B. Hall & Co.*, 748 F.Supp. 190, 194 (S.D.N.Y. 1990) (Patterson J.) (effect of defendants' conduct would not justify expending judicial resources of United States). According to the complaint, there were four intermediate effects that led to the loss in the United States. First, the extortion scheme in Spain generated negative publicity in the Spanish press; second, based on the negative newspaper article, Extebank refused to refinance Marugan's loan and eventually canceled the loan; third, due to the cancellation of the loan, Marugan was unable to renovate the 65th Street property; fourth, because of Marugan's inability to complete renovations, he was forced to sell it at a loss of $1,900,000. Thus, because the effects of the conspiracy in the United States are remote and indirect, they are insufficient to confer jurisdiction.

Plaintiff also argues that if Banesto deposited proceeds from the extortion scheme in the United States, that would satisfy the effects test. *See Republic of Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988) (upholding jurisdiction when defendants had invested over $11 million in fraudulent proceeds in the United States). However, in this action, Marugan did not pay any monies to Judge Pascual or Banesto, and there is no allegation in the complaint that Banesto invested any fraudulently obtained proceeds in the United States.

Appendix B

To some degree the tests for extraterritorial jurisdiction vary depending on the substantive law. *North South Finance Corp.*, 100 F.3d at 1051. The Second Circuit noted that the conduct and effects tests are based on the Congressional intent in enacting the securities and antitrust statutes. However, the court could not assume that the Congressional intent in enacting RICO warrants a similar approach. *Id.* The rationale of the conduct test may be applicable to RICO in that foreign entities should not be "flocking" to the United States to engage in organized crime and escape punishment. *See Madanes v. Madanes*, 981 F.Supp. 241, 250 (S.D.N.Y. 1997) (Sand J.) (*citing* Kristen Neller, Note, *Extraterritorial Application of RICO: Protecting U.S. Markets in a Global Economy*, 14 MICH. J. INT'L L. 357, 382 (1993)). The rationale of the effects test may also be applicable to RICO in that extraterritorial application would serve to protect domestic citizens and markets from corrupt foreign influences. *Id.* Moreover, the Second Circuit noted that because the civil action provision of RICO was patterned after the Clayton Act, *Agency Holding Corp., v. Malley-Duff & Assoc.*, 483 U.S. 143, 150 (1987), the effects test may be a more appropriate test. *North South Finance Corp.*, 100 F.3d at 1052.

Declining to specify the test for the extraterritorial application of RICO, the court noted that "the ultimate inquiry . . . is whether Congress would have wished the precious resources of United States courts to be devoted to foreign transactions rather than to leave the problem to foreign countries." *Id.* Through that lens, this Court does not have jurisdiction over a conspiracy among foreign actors to extort money from a foreign plaintiff when the actions

took place in Spain and there was no substantial effect in the United States. Moreover, under the principles of international comity, this Court should defer to the courts of Spain in resolving this controversy. *Consolidated Gold Fields, PLC v. Minorco*, 871 F.2d 252, 262 (2d Cir. 1989).

Conclusion

Because the instant controversy involves an alleged scheme by a Spanish bank to extort money from a Spanish citizen where all of the relevant conduct took place in Spain, and did not have a substantial direct effect in the United States, this Court finds it unlikely that Congress would have wished the precious resources of United States courts to be devoted to this action. For the reasons stated above, the defendant's motion to dismiss the RICO claims pursuant to Fed. R. Civ. P. 12(b)(1) is granted. As it is without jurisdiction, this Court need not address the remaining prongs of defendant's motion. In addition, because the RICO claims provide the sole basis for federal jurisdiction, this Court declines to exercise its supplemental jurisdiction over plaintiff's claims under state law pursuant to 28 U.S.C. § 1367(c)(3).

Dated: June 25, 1999
New York, New York

SO ORDERED:

s/ William H. Pauley III
WILLIAM H. PAULEY III
U.S.D.J.

Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

(2)

No. 99-1960

IN THE

Supreme Court of the United States

ENRIQUE MARUGÁN GIRÓ,

Petitioner,

v.

BANCO ESPAÑOL DE CRÉDITO S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly applied the proximate causation test announced in *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992), to dismiss a claim under the Racketeer Influenced and Corrupt Organization Act in which: (*i*) all of the alleged predicate acts involved a Spanish judge, acting in a Spanish court against a Spanish citizen, and (*ii*) the only effects in the United States are alleged lost profits suffered over two years later upon the sale of property owned by a company in which petitioner is the shareholder?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent Banco Español de Crédito S.A. states that Banco Santander Central Hispano S.A. owns ten percent or more of Banco Español de Crédito S.A.

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COUNTERSTATEMENT OF JURISDICTION

The District Court dismissed this case for lack of subject matter jurisdiction, because "the instant controversy involves an alleged scheme by a Spanish bank to extort money from a Spanish citizen where all of the relevant conduct took place in Spain, and did not have a substantial direct effect in the United States . . . ." [Dist. Ct. Dec. at 17a.][1] The Court of Appeals similarly found that "[b]ecause Marugán has not alleged sufficient facts to show proximate cause under [the Racketeer Influenced and Corrupt Organization Act ("RICO")], he also has not alleged enough to establish extraterritorial jurisdiction." [Ct. App. Dec. at 8a n.2.] The issue of extraterritorial application of RICO is discussed by some courts as one of subject matter jurisdiction. As a result, the subject matter jurisdiction of this Court is an issue fairly presented by the Petition. The impropriety of applying RICO extraterritorially to the facts pled in this case is discussed in detail in Point I of the argument below.

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Facts Alleged in the Complaint

This case involves an alleged scheme by a Spanish judge named Luis Pascual Estevill to use his position to extort bribes from potential criminal defendants in Spain and an alleged conspiracy involving respondent Banco Español

1. Numbers appearing within square brackets refer to the Petition for a Writ of Certiorari ("Petition" or "Pet.") and to the Court of Appeals decision ("Ct. App. Dec.") and District Court decision ("Dist. Ct. Dec.") attached as appendices to the Petition.

de Crédito S.A. (known in Spain as "Banesto") in that scheme. Petitioner Enrique Marugán Giró allegedly was converted from a witness in a legal proceeding initiated by Banesto into a criminal defendant when the assigned judge was away for vacation. Although petitioner claims to have been the object of the extortion scheme, his complaint does not allege that he was ever asked by a conspirator to pay a bribe. Rather, he alleges that he heard of the bribery scheme from another victim. While he claims to have refused to pay any bribe, he does not allege that he ever communicated that fact to any conspirator. The criminal charges against petitioner were dropped after the assigned judge returned from vacation, less than four weeks after the charges were brought.

Petitioner claims that his refusal to make a payment to Judge Pascual prompted the conspirators to take retaliatory steps against him by notifying the media of the warrant issued for his arrest. His complaint also alleges that the conspirators caused the story to be sent to Extebank, a lender with whom he dealt. He claims that Extebank refused to provide him with a requested loan as a result of the publicity. Almost three years after the publicity — long after the charges against petitioner had been dropped, after the Spanish judge who perpetrated the scheme had been convicted of extortion and jailed in Spain, and after petitioner already had begun a lawsuit against the Spanish judge in a United States court — petitioner claims that because of the events alleged in the complaint, he was forced to sell a building in New York City for less profit than he otherwise had hoped to obtain. The building, which sold for more than its purchase price, was owned not by petitioner, but by a corporation in which he was the sole shareholder.

B. Counterstatement of the Proceedings Below

In proceedings below, respondent not only argued that petitioner failed to plead facts sufficient to give rise to subject matter jurisdiction, but also argued that petitioner lacked standing to sue because his alleged injuries were mediated through a company that he owned and were far removed in place and time from the alleged predicate acts. Respondent also argued that petitioner failed to properly plead a RICO pattern, had suffered no cognizable injury under RICO and, as to petitioners' state law claims, that they should be dismissed as time barred. Respondent also argued that the case should be dismissed on grounds of *forum non conveniens*.

The District Court ruled that RICO did not apply extraterritorially to the conduct alleged. Analyzing the issued under both the conduct and the effects tests that have been applied in similar cases, the District Court held that all of the conduct described in the Complaint had taken place in Spain and that the effects alleged to have taken place in the United States were "too remote and indirect to confer jurisdiction" on the Court, because any effects in the United States were mediated through at least four intermediate effects. [Dist. Ct. Dec. at 15a.] The District Court therefore dismissed the case under Fed. R. Civ. P. 12(b)(1), without reaching respondent's other grounds for seeking dismissal. [*Id.* at 17a.]

The Court of Appeals, in a summary order that appears in the Federal Reporter as a table decision and that may not otherwise be cited as precedent, Second Circuit R. 0.23,[2]

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2. Second Circuit Rule 0.23 provides that "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, (Cont'd)

analyzed the facts alleged by petitioner in light of RICO's standing provisions and found that the "three years between the alleged fraud" and the claimed loss, "the number of independent intervening actions and decisions by third parties," and the "disconnect between the alleged harm that eventuated (the sale of a U.S. property at a loss) and that which was immediately intended (the payment of a bribe to a judge)" meant that petitioner "failed to allege facts that would show that he was injured 'by reason of' the Bank's actions under . . . RICO." [Ct. App. Dec. at 7a-8a.] The Second Circuit added that because petitioner "has not alleged sufficient facts to show proximate cause under RICO, he also has not alleged enough to establish extraterritorial jurisdiction." [*Id.* at 8a n.2.][3]

(Cont'd)
disposition will be made in open court or by summary order." The rule adds that such summary orders "do not constitute formal opinions of the court" and therefore should "not be cited or otherwise used in unrelated cases before this or any other court."

3. This is the second federal lawsuit that petitioner has pursued in the United States against one of the alleged conspirators. On March 27, 1996, petitioner and a corporation that he owns commenced an action against Judge Pascual in the Southern District of New York. On February 18, 1998, the district court dismissed the case for lack of personal jurisdiction. *Giró v. Estevill*, 1998 WL 63407 (S.D.N.Y. 1998). The Court held that the connection between New York and Pascual's tortious acts in Spain was too indirect to support a finding of forseeability:

> While [Pascual] must have foreseen that his actions would have consequences in Spain, he could not have reasonably foreseen that his local actions in Spain against a Spanish citizen would cause emotional . . . injury in New York — a state in which plaintiff [Marugán] does not reside, in a country of which he is not a citizen. The connection is too remote.

Id. at *2.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the unsigned memorandum accompanying a summary order, because petitioner did not like the conclusions the Second Circuit panel drew after applying the proximate cause standard analyzed by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The Second Circuit's ruling did not break any new ground. It did not offer a refinement or new interpretation of *Holmes*. It is a straightforward analysis of proximate cause under the *Holmes* standard. The Second Circuit ruled that petitioner "failed to plead facts" sufficient to meet the proximate cause requirements imbedded in RICO's standing provision, 18 U.S.C. § 1964(c). The panel's opinion cannot even be cited as precedent. Second Circuit R. 0.23. In short, the Second Circuit's decision is an unremarkable and entirely correct application of law to facts that does not warrant the attention of this Court.

I.

THE COURTS BELOW CORRECTLY HELD THAT RICO DOES NOT APPLY EXTRATERRITORIALLY TO ACTS BY A SPANISH JUDGE IN A SPANISH COURTROOM AGAINST A SPANISH CITIZEN THAT HAD NO DIRECT IMPACT ON PETITIONER IN THE UNITED STATES.

A. Numerous Independent Actions and Decisions by Third Parties Render Any Effect in the United States Too Attenuate and Remote to Warrant Extraterritorial Application of RICO.

This Court has recognized that Congress has the authority to enforce its laws beyond the territorial boundaries

of the United States and that "unless there is the affirmative intention of the Congress clearly expressed, [courts] must presume it is primarily concerned with domestic conditions." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotations omitted). No clear statement of Congressional intent is evident in RICO, making the propriety of its extraterritorial application highly questionable. The few courts that have applied RICO extraterritorially have looked for conduct necessary to the RICO conspiracy in the United States or, in the absence of such conduct, substantial effects in the United States. *See, e.g., North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); *Alfadda v. Fenn*, 935 F.2d 475, 479-80 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); *see also Gassner v. Stotler & Co.*, 671 F. Supp. 1187, 1189 (N.D. Ill. 1987).

In the present case, neither standard is satisfied. Petitioner alleges no conduct in the United States. The predicate RICO acts all took place in Spain, as the District Court found. [Dist. Ct. Dec. at 14a-15a.] The effect of which petitioner complains was mediated through a long series of other effects that render the connection between the alleged RICO conspiracy in Spain and the effects in the United States too attenuated and remote to warrant the application of RICO. The intermediate effects include at least the following:

1. There was the decision by the editor of *El Pais* in September 1995 to run a story based upon the news that petitioner was named as a defendant in the criminal proceeding.

2. There was the decision by a person at Extebank to read the article in *El Pais* and call petitioner.

3. There was petitioner's apparent inability, in an alleged emergency meeting, to convince Extebank that the charges did not present a real or significant issue.

4. There was the decision by Extebank — at a time not specified in the complaint — not to refinance the property in New York.

5. There was petitioner's apparent inability to convince another lender to refinance the property.

6. There was the need — almost three years later in 1997, long after the criminal charges against petitioner had been dropped and the Spanish judge put in jail — for petitioner's company to sell the property.

7. There was the alleged $1.9 million loss on the property, even though petitioner paid only $850,000 to purchase it and received $1.125 million upon its sale.

8. There was the resulting injury to the company that owned the property.

9. There was the diminution in value to the shares of the company held by petitioner — the effect for which he sues in this case.

These intermediate effects add emphasis to the simple fact that the effect highlighted by petitioner as the gravamen of his case — the diminished value of real estate in New York — was almost three years, thousands of miles and many steps removed from the alleged predicate acts in Spain. After analyzing these facts, the District Court concluded that the controversy did not involve a "substantial direct effect in

the United States" that properly could give rise to jurisdiction under RICO. [Dist. Ct. Dec. at 17a.] Similarly, the Second Circuit concluded that "the number of independent intervening actions and decisions of third parties" and the passage of almost three years made it "likely that 'the loss [was] attributable to events occurring in the interim.' " [Ct. App. Dec. at 7a (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995)).]

Even if Congress had evinced a desire to apply RICO extraterritorially, the Court of Appeals and District Court were entirely correct in determining on the record before them that RICO should not be so applied in this case.

B. This Court's Cases Do Not Alter the Analysis Merely Because Petitioner Claims that He Was the Direct Target of the Conspiracy.

Petitioner attempts to overcome the attenuated and inadequate connection between the events in Spain and the effect he alleges in the United States by saying that the "extortionate scheme was directed at [him] and not some third person." [Pet. at 10.] This contention alone cannot overcome the fact that no conduct took place in the United States and that the effects of the scheme in the United States resulted from many intervening decisions by outside parties. Moreover, even though he claims to be the intended victim of the bribery scheme, petitioner does not allege that he was asked directly for a bribe, but instead alleges that he heard about the bribery scheme from another victim. He also does not allege that he ever communicated his intention not to pay to anyone other than the same victim. Nevertheless, he alleges that his refusal to pay prompted the conspirators to publish information about the criminal proceedings in Spain.

Contrary to petitioner's contention [Pet. at 10], this Court's ruling in *Holmes* does not remove the proximate cause requirement from RICO simply because the extortionate scheme allegedly was "directed at" petitioner. The Court was clear in *Holmes* when it said that "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry . . . ." 503 U.S. at 274 n.20. *Holmes* correctly requires a proximate cause analysis in all cases in order to show that the injury or effect felt by plaintiff is the "direct" result of the RICO predicate acts. The Petition attempts to recast this standard as one that merely requires the predicate acts to be "directed at" petitioner. [Pet. at 10.] *Holmes* makes it clear, however, that even the intended victim of the predicate acts cannot recover for every conceivable effect flowing from those predicate acts, but only for those proximately caused by them. *See Holmes*, 503 U.S. at 266 n.10 ("there is a point beyond which the wrongdoer should not be held liable" (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982)); *see also id.* at 287 (Justice Scalia, concurring in the judgment) ("[l]ife is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith").

Contrary to petitioner's contention [Pet. at 7], therefore, the Second Circuit's ruling in this case is not at odds with this Court's prior rulings regarding application of RICO. Quite the contrary, this case is no more than an ordinary application of the proximate cause standard described in *Holmes* to the particular facts alleged by petitioner in his own complaint — a conclusion that is reinforced when the factors highlighted by the Court in *Holmes* are analyzed in light of the facts alleged here. 503 U.S. at 269 (citing

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540 (1983)). In particular, in *Holmes* the Court identified the difficulty of ascertaining the amount of damages "attributable to the violation, as distinct from other, independent factors," as a reason why the proximate cause inquiry is required. 503 U.S. at 269. In this case, petitioner's alleged injury occurred almost three years after the underlying predicate acts and depended upon intervening decisions by independent bankers and others. Moreover, the injury complained of is in the form of lost profits upon the sale of real estate. Determining the extent to which those profits were legitimately anticipated and the extent to which they were lost as a result of respondent's actions, as opposed to market forces or other factors, will present precisely the kind of difficulty in ascertaining damages highlighted by the Court in *Holmes*. *See id.* at 271. In addition, the directly injured party — petitioner's real estate holding company — could vindicate its rights in an appropriate proceeding in Spain. Shoehorning this case into a RICO claim brought by a corporate shareholder in a United States District Court is unnecessary to the vindication of those rights, if any exist.

Petitioner points to no circuit court cases that support his claim that *Holmes* allows the intended victim of a predicate act to proceed without a showing of proximate cause. He does, however, refer to dicta in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990), to suggest that the panel decision in this case is at odds with Second Circuit law. In making this argument, however, he ignores the more recent and explicit statements by the Second Circuit in its post-*Holmes* ruling in *Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229, 241 (2d Cir. 1999), *cert. denied*, 120 S. Ct.

799 (2000), in which the court specifically *rejected* the assertion that "even if [plaintiffs'] claims fail the direct injury test, they should still have standing to sue because an exception to this rule exists where the defendants specifically intend to harm plaintiffs." *See also id.* at 242 ("an allegation of specific intent does not overcome the requirement that there must be direct injury . . .").[4]

Based upon the facts alleged, this case properly was dismissed as an inappropriate extraterritorial application of RICO, as both the Court of Appeals and District Court found upon consideration of petitioner's pleadings. [Ct. App. Dec. at 8a n.2, Dist. Ct. Dec. at 15a.]

II.

ANY INJURY TO PETITIONER IN THE UNITED STATES WAS TOO REMOTE, ATTENUATED AND INDIRECT TO GIVE PETITIONER STANDING UNDER RICO.

The same facts that rendered petitioner's claims too remote and attenuated to warrant extraterritorial application of RICO to this case also required dismissal under RICO's statutory standing provision.

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4. Even if the panel's decision in this case was at odds with prior Second Circuit law (and it was not), petitioner's proper remedy for such an intra-circuit issue would be to petition the Court of Appeals for rehearing or rehearing *en banc*. No such petition was filed in this case and this Court normally does not grant certiorari to resolve such intra-circuit issues. *Davis v. United States*, 417 U.S. 333, 340 (1974).

RICO provides a civil remedy only to those who are injured "by reason of" a RICO predicate act. 18 U.S.C. § 1964(c). Relying on this Court's analysis of similar language in Section 4 of the Clayton Act, the Court in *Holmes* said that this provision requires a RICO plaintiff to show that the predicate acts "proximately cause[d] the injury claimed." 503 U.S. at 276. Borrowing from *Associated General Contractors of California, Inc. v. California Council of Carpenters*, 459 U.S. at 540, the Court noted that the "directness of the relationship" between "the injury asserted and the injurious conduct" has been a "central element" of the Court's analysis of the "by reason of" requirement in Section 1964(c). *Holmes*, 503 U.S. at 268-269.

The injury alleged in this case is far from direct. Petitioner's alleged lost profits on the sale of real estate in New York City is several times removed from the alleged RICO predicate act of attempting to extort money in Spain. As highlighted by the Court of Appeals, the passage of almost three years between the alleged extortionate demand and the loss on the sale of real property in the United States, the intervening decisions of others (and of the New York real estate market) affecting the value of the real estate, and the disconnect between the immediately intended harm from the extortionate demand (obtaining a bribe) and the eventual injury (lost profits an ocean away) make it highly likely that the loss alleged in this case "is attributable to events occurring in the interim." [Ct. App. Dec. at 7a (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d at 772).]

Petitioner's claim to have standing under RICO is further undermined by the fact that he is attempting to pursue claims that more properly belong to the corporation that owned the real estate. That corporation, not petitioner, was the party

injured when the real estate allegedly was sold for lower profits. As the shareholder of that corporation, petitioner's injuries were, at most, indirect. It is black letter law that a shareholder has standing only where he has suffered injury distinct from that of the corporation or where the shareholder is owed a special duty separate and apart from that owed to the corporation. *See, e.g., Manson v. Stacescu*, 11 F.3d 1127, 1131-32 (2d Cir. 1993), *cert. denied*, 513 U.S. 915 (1994); *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-64 (2d Cir. 1993). In this case, petitioner can point to no such distinct injury or special duty. Moreover, there is no exception to this rule for shareholders who claim that they were the target of the bad acts. *See Manson*, 11 F.3d at 1129 (no shareholder standing where shareholders claimed that defendants' acts "injured them personally" and that defendants "threatened [shareholder] with financial ruin and murder").

The propriety of the Court of Appeals decision is further reinforced by the fact that petitioner does not even allege a direct effort to extort money from him. Rather, the extortion attempt allegedly was directed towards another person (Rosal) who then informed petitioner of the scheme.[5]

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5. Under well-settled RICO precedent, the facts alleged do not constitute a RICO predicate act directed towards petitioner, because there was no "active demand or threat on the part of the government official" that was directed towards petitioner himself. *See United States v. Allen*, 155 F.3d 35, 44 (2d Cir. 1998). Judge Pascual's decision to name petitioner as a defendant may well have been a preparatory step in furtherance of an unrealized plan to extort money from him. But RICO only affords standing to those injured by preparatory acts that are also RICO predicate acts. *Hecht v. Commerce Clearinghouse, Inc.*, 897 F.2d at 25.

Petitioner's alleged injury is at best an indirect consequence of the Spanish conspiracy alleged in the complaint. The passage of time and the substantial number of intervening decisions and actions of others make it highly unlikely that the injury petitioner seeks to address occurred "by reason of" the predicate acts he alleges. This case properly was dismissed by the Court of Appeals and the District Court on the facts and the law. Further review by this Court is unwarranted and unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

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No. 99-1960

IN THE

Supreme Court of the United States

ENRIQUE MARUGÁN GIRÓ,

Petitioner,

v.

BANCO ESPAÑOL DE CRÉDITO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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THE COURT SHOULD GRANT THIS PETITION IN ORDER TO ADDRESS WHETHER RICO IS AVAILABLE TO INTENDED VICTIMS OF RACKETEERING WHO SUFFER INTENDED INJURIES IN THE UNITED STATES, BUT WHERE THE RACKETEERING CONDUCT OCCURS SUBSTANTIALLY OUTSIDE THIS COUNTRY.

Petitioner recognizes that the question presented for this Court's consideration involves the proximate cause analysis applied by the Second Circuit in the instant case, not the extraterritorial application of RICO. Although Respondent continues to argue that RICO has no extraterritorial application, both the Second Circuit and the District Court rejected this statement of the law. Significantly, however, extraterritorial conduct was a factor in the Second Circuit's proximate cause analysis.

Specifically, for the Second Circuit, the fact that substantial racketeering conduct occurred in Spain, far from the resulting injury in New York, outweighed the fact that the conspirators intended to injure Mr. Marugán in New York and took a series of steps to make this happen. The Second Circuit presumably intended its decision to be a direct application of this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Petitioner respectfully submits that such a strict proximate cause inquiry violates the spirit, and, frankly, the express holding of *Holmes*, and the Congressional intent behind civil RICO.

This Court should reject Respondent's argument that because the Second Circuit's decision is unpublished, it is, consequently, of no significance. To the contrary, it is significant, not only because it prevents the instant victim

of racketeering from suing for his injuries, but because it is capable of repetition as long as there is no Supreme Court decision which addresses RICO's proximate cause requirement as it applies to foreigners who suffer racketeering injury in the United States.

The spirit of *Holmes* is best expressed in the following passage, in which this Court quotes from *Prosser and Keeton on Law of Torts*:

> At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."

503 U.S. at 268 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)). While applying proximate cause criteria, this Court never lost sight of RICO's remedial purpose, noting that the conspirators would not go unpunished, despite its holding in the matter at hand, because the proper plaintiffs had already sued them. *Id.* at 273.

Here, not only is Mr. Marugán the proper plaintiff, he is the only plaintiff who can sue for these injuries. The Bank's racketeering conduct should not go unpunished, simply because the majority of it occurred overseas. In addition, the instant lawsuit is "administratively possible and convenient." There is no other person more directly injured by the Bank's racketeering conduct than Mr. Marugán and the amount of damages, consisting predominantly of lost profits in New York real estate, is easily ascertainable. Further, the Bank has legal counsel and a branch office in New York, the situs of the lawsuit, and, thus, an action there is convenient. Finally, neither Mr. Marugán, nor the *defunct* corporations, which existed solely to hold the real estate, are able to sue in Spain for these injuries.

In sum, the Court should hear this case because justice demands that the intended victim of racketeering, even a non-United States citizen, who suffered the intended injury in the United States, should be able to invoke civil RICO in United States' courts, notwithstanding that the intended harm took time and effort to obtain.

Respectfully submitted,

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